IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 102 of 1985

FIRM CHALANA BROTHERS
V/S
FIRM HEMRAJ SURAJ MAL

Mr. SANJEEV SHARMA, for the appellant / petitioner

Date of Order : 18.9.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This appeal has been filed by the defendant against the judgment and decree of the learned trial court dt. 23.7.1985 decreeing the plaintiff's suit for a sum of Rs. 23378.38 with proportionate cost and interest @ 6% pendente lite, and till realisation.

Facts of the case are, that the plaintiff filed a suit for recovery of Rs. 28494.38 (specified amount), alleging interalia, that the plaintiff is a registered partnership firm, carrying on commission agency business, while the defendant is a firm which carries on business at Mandi Dabli, Tehsil Hanumangarh. It was alleged that in Samvat 2022 there was restriction against export of gram outside Rajasthan, inasmuch as the quantity of gram that could be exported was to be equal to the gram which was

delivered to the Government as levy, at the price fixed by the Government, and it was agreed between the parties, that the defendant will purchase goods in Adat of the plaintiff, and will deliver the goods to the Government, and will export outside Rajasthan, and on such transactions the charges of Adat, interest, Dharmada, Godown Rent, Postal Charges etc. would be payable as per market custom, and in case the goods are exported beyond the permissible limit, through the permit of other persons, it was agreed that the difference amount, between the permit price and the market price would be paid. The accounts were agreed to be settled at Bikaner, and accordingly the business commenced. According to the plaintiff a sum of Rs. 1.50 Paise was agreed to be Adat for delivering the goods to the Government and loading it for export, and 37 Paise was to be paid by way of loss of interest, with respect to the goods which was to be given to the Government as levy. It was alleged by the plaintiff, that the transactions that were entered into by the plaintiff were duly entered in the defendant's of accounts. Similarly the defendant also undertook transactions in commission agency of the plaintiff regarding Gwar, for which separate account was opened, and after settlement of the account of Gwar, the balance was transferred to the previous account. After giving details of the transactions during different period, the amounts debited to the defendant, and amounts credited to the defendant's account, were pleaded, and it was

pleaded, that a net amount of Rs. 26598.70 remained outstanding against the defendant as on Samvat 2023, copies of the books of accounts were produced along with the plaint. Claiming interest on this amount to the tune of Rs. 1894.93, the suit was filed for the above amount, on 27.11.67.

The defendant contested the suit disputing the plaintiff to be registered partnership firm. It was, however, admitted that the commission agency contract was entered into, but then, it was disputed that any difference in the price was agreed to be paid in the event of goods being exported on the other trader's permit. Rate of Adat was also disputed, and was pleaded to be Rs. 1/- per bag. Likewise quantity of the goods transported was also disputed, quantity of the goods delivered to the Government was also disputed, and various other such factual disputes were raised. It was contended, that the books are not regularly maintained. According to the defendant neither any arrangement of any permit was ever made, and even if it were to be made, the details are not given from whom it was made, and how much amount was paid for it, apart from the fact that any such arrangement was prohibited by law, and was illegal. Then, certain other amounts were also disputed, and a counter claim of Rs. 12906.28 was lodged by the defendant.

The plaintiff filed a reply to the counter claim, raising various objections.

The learned trial court framed as many as 13 issues which read as under:-

"1) क्या फर्म वादी रजिस्टर्ड है और अर्जीदावे पर सक्षम सक्स के हस्ताक्षर है?

2) क्या प्रतिवादी ने वादी से 1-50 पैसे बोरी आढत देने को मुआदा किया था और वादी के 15708/- बाबत आढत वाजिब होती है?

3) क्या वादी 4832.65 पैसे मजदूरी टेलीफोन के 190/- खर्च गोदाम किराया के 330/- व चिठी के 33/- के प्रतिवादी की तरफ से व प्रतिवादी के लिये खर्च किये और यह रकम रकूमात वादी प्रतिवादी से पाने का अधिकारी है?

4) क्या वादी ने हस्ब पैरा 11 अर्जीदावा 328 8 क्यु. 57 किलो 800 ग्राम वजन के परमिट मुदायला की हिदायत से बाजार में इंतजाम किया और खरीदे और उसके फर्क के 15110-50 पैसे खर्च किये जो मुदायला के जिम्मे वाजिब हुए।

5) क्या वादी प्रतिवादी की तरफ से परमिट कानून इंतजाम कर बाजार से खरीद सकता था?

6) अगर तनकी नं.5 खिलाफ वादी साबित हो तो भी क्या वादी 15110-50 पैसे की रकम प्रतिवादी से वसूल पाने का अधिकारी है?

7) क्या वादी के सूद के 8551-88 पैसे वाजिब है और वादी सूद पाने का अधिकारी है?

8) क्या प्रतिवादी 1500/- नगद वादी के यहा से उठाये?

9) क्या वादी ने 160 बोरी दाल 100 बोरी चना व तीन बोरी चना प्रतिवादी की हिदायत से प्रतिवादी के लिये खरीदे किये। एवं 15582-52 पैसे व 7621-09 व 194-07 पैसे क्रमश: चना व दाल चना के वाजिब है?

10) क्या वादी ने जो हिसाब पेश किया है उससे वादी नें 54789-94 पैसे प्रतिवादी के नाम गलत मांडे है?

11) क्या प्रतिवादी नें 531 बोरी चना कीमती 24096-78 पैसे वादी को आढत से और भेजे थे और हस्ब पैरा 28 व 29 जवाबदावा

प्रतिवादी के 12906-28 पैसे बजिमे वादी वाजिब है?

12) क्या वादी प्रतिवादी को वाउचर्स रसीदात व दीगर कागजात देख कर हिसाब समझा दिया है। अगर ऐसा नहीं किया है तो दावे पर क्या असर पड़ेगा?

13) क्या मुदई 28494-38 पैसे की डिक्री खिलाफ मुदायला पानें का मुश्तहक है?"

Thereafter vide order dt. 29.10.73 issues no. 1 and 12 were decided in the manner, that issue no. 1 relating to the question of plaintiff being registered partnership firm, and suit being signed by competent person was decided in favour of the plaintiff, and issue no. 12 being, as to whether the plaintiff has explained the vouchers, receipts and different papers to the defendant, and has explained the accounts, if not, what is the effect, was decided in the manner, that it was the duty of the plaintiff to explain the account, which he has not done, and therefore, a Commissioner, Shri Jagannath Bardia, was appointed. I may gainfully quote the relevant part of the order of the learned trial court dt. 29.10.1971 which reads as under:-

".....अत: तनकी न.12 का फैसला खिलाफ वादी किया जाता है डिगरी इब्तदाई बाबत हिसाब फेहमी बहक प्रतिवादी खिलाफ वादी हस्ब आर्डर 20 रूल 16 व 17 C.P.C. सादीर की जाती है और श्री जगन्नाथ बरड़ीया को हिसाब की जांच व रिपोर्ट के लिये कमिश्नर मुकर्रिर किया जाता है कमिश्नर को हिदायत दी जाती है कि वह मिती बैसाख शुदी 3 सम्वत 2022 से तारीख दायरी दावा तक का हिसाब वादी से लेकर हिसाब बाउचर व रसीदात व अन्य कागजात की जांच कर व शहादत लेकर तनकीहात नम्बर 2 ता 11 में दरजशुदा वाकेआत व अमुरात की बाबत अपनी रिपोर्ट पेश करे, खरचे मुकदमे का तस्फीया कतई डिगरी के समय किया जावेगा रजिस्टर मै फैसला दरज किया जावे।....."

The learned Commissioner recorded the evidence of the parties, and submitted his report on 26.3.1979, recommending the suit to be decreed for an amount lesser by Rs. 5116/-.

On the report of the Commissioner, objections were filed by the defendant, and to those objections reply was filed by the plaintiff, and then after hearing the parties, learned trial court though purportedly giving its own reasons, virtually accepted that report, and passed the decree.

Assailing the impugned judgment and decree it was contended, that in the present case, neither the commissioner could be appointed, nor could commissioner record the evidence, while he has framed as many as 17 issues, and recorded the evidence, and submitted a report, albeit virtually a judgment, which is not permissible by law, rather the learned trial court has abdicated his jurisdiction in favour of the Commissioner, and thus the impugned judgment and decree is liable to be set aside.

I have considered the submissions, and have gone through the record. Since nobody appears for the respondent, I have to consider the matter myself.

As appears from the above order dt. 29.10.1971

that the learned trial court has purported to pass a preliminary decree for rendition of account under O. 20 Rule 16 and 17 C.P.C., and purportedly appointed a Commissioner. A look at the provisions of O. 20 R. 16 and 17 shows, that Rule 16 comprehends the case, where there is a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree, directing such accounts to be taken as it thinks fit. Then, under Rule 17 the Court may either by the decree direct an account to be taken, or by any subsequent order give special directions, with regard to the mode in which the accounts is to be taken, or vouched, and in particular may direct, that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised.

This, in my view, shows that these provisions are applicable in cases where the suit is basically a suit for rendition of accounts. Likewise the provisions of O. 26 Rule 10 and 11 are also applicable to such suits only. As against this, a look at the plaint shows, that the

plaintiff cataloged the stipulations agreed between the parties regarding different rates, and then has detailed the precise transaction undertaken, and the precise entries of debit and credit, and on that basis has claimed a specified amount to be due to the defendant. On the other hand, the defendant contested the suit by disputing various stipulations, so also various specific transactions, and the volume of the goods involved, and on the basis of the items pleaded by the defendant, laid a counter claim for specified amount. It was nobody's case, that any accounting is required to be done, rather the parties were at issue with respect to specified terms, stipulations of business, and specified items of transactions, and consequently laid claims and counter claims for different amounts. In such circumstances, there was no occasion for the learned trial court to pass any preliminary decree, or to appoint the Commissioner, in the manner done. Rather it clearly appears, that the learned trial court clearly avoided to try the suit itself by recording evidence of the parties with respect to each issue, on which the parties were at variance, as is clear from the language of issue no. 2 to 11, which all clearly show, that parties were at variance with respect to specific items, and specific stipulations, and no accounting was to be undertaken. In such circumstances, by the order dt. 29.10.1971, in the garb of purportedly acting under O. 20 Rule 16 and 17, the whole trial of the suit could not be abdicated to the

Commissioner, who proceeded to re-frame the issues, record the evidence of the parties, and submit the report, virtually in the nature of a judgment, and the learned trial court without properly directing itself towards the objection to the very appointment of the Commissioner, and the powers of the Commissioner, proceeded to examine the findings on merits, and has proceeded to pass the decree. To say the least, the whole course adopted by the learned trial court cannot be said to be supported by law in any manner whatever.

The net result is that the appeal is allowed. The impugned judgment and decree is set aside, and the matter is remanded back to the learned trial court to try it afresh in accordance with law from the stage after framing of the issues, and then to decide the matter in accordance with law. Record of the learned trial court be returned forthwith.

(N P GUPTA),J.

/Sushil/